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September 21, 1994

William F. Caton  
Acting Secretary,  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Via Messenger

DOCKET FILE COPY ORIGINAL

Re: **PP Docket No. 93-253**  
**Implementation of Section 309(j) of the**  
**Communications Act - Competitive Bidding**

Dear Mr. Caton:

Submitted herewith on behalf of the Association of Independent Designated Entities ("AIDE") are an original plus eleven (11) copies of its Petition for Reconsideration of the Commission's Order on Reconsideration (released August 15, 1994) in the above-captioned matter.

Please direct any questions or comments concerning this submission to my office.

Respectfully submitted,

*William J. Franklin*

William J. Franklin  
Attorney for the Association of  
Independent Designated Entities

Encs.  
cc: Assoc. of Independent  
Designated Entities

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Implementation of Section 309(j) ) PP Docket No. 93-253  
of the Communications Act )  
 )  
Competitive Bidding )  
To: The Commission

DOCKET FILE COPY ORIGINAL

PETITION FOR RECONSIDERATION  
OF THE ASSOCIATION OF  
INDEPENDENT DESIGNATED ENTITIES

The Association of Independent Designated Entities ("AIDE"), by its attorney and pursuant to Section 1.429 of the Commission's Rules, hereby seeks reconsideration of the Commission's Order on Reconsideration in the above-captioned proceeding.<sup>1/</sup> As set forth herein, the Commission failed to adequately protect the interests of small businesses, rural telephone companies, and businesses owned by members of minority groups and women (defined in Paragraph 227 of the Second Report and Order in this proceeding as "Designated Entities").<sup>2/</sup>

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<sup>1/</sup> 9 FCC Rcd \_\_\_\_ (FCC 94-217, released August 15, 1994) ("Order"). A summary of the Order was published in the Federal Register on August 22, 1994 (59 FR 43062). Pursuant to Section 1.4 of the Commission's Rules, this Petition is timely filed. The Commission adopted the Order on its own motion, and thus AIDE has not had a previous opportunity to address the merits of the Commission's actions therein.

<sup>2/</sup> See Second Report and Order, 9 FCC Rcd \_\_\_\_ (FCC 94-61, released April 20, 1994) (¶227) ("Second R&O").

## FACTUAL BACKGROUND

In adopting Section 309(j) of the Communications Act, Congress specified that an objective of competitive bidding was to:

Promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women....<sup>3/</sup>

To implement this goal, Congress required the Commission, in its implementation of competitive bidding regulations, to:

Ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and for such purposes, consider the use of tax certificates, bidding preferences, and other procedures....<sup>4/</sup>

AIDE is an unincorporated association, with membership limited to persons and entities likely to be classified as "Designated Entities" under Section 309(j) of the Communications Act. AIDE has previously participated in this proceeding, and its qualifications are a matter of public record. Various AIDE members have extensive legal, technical, financial, and communications backgrounds. Many have owned or managed small businesses, and understand the special needs and problems of small and start-up businesses. Accordingly, AIDE has a special expertise to present the position of the Designated Entities to the Commission.

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<sup>3/</sup> Section 309(j)(3)(B) of the Communications Act.

<sup>4/</sup> Section 309(j)(4)(D) of the Communications Act.

**THE COMMISSION EXCEEDED ITS AUTHORITY UNDER SECTION 309(j)  
IN EXPANDING THE NON-ATTRIBUTABLE INTERESTS OF BIG  
BUSINESSES IN DESIGNATED ENTITIES**

In the Fifth Report and Order in this proceeding,<sup>5/</sup> the Commission created an substantial exception to the statutory preferences which it had created for Designated Entities in the broadband PCS auctions. Specifically, the Commission designated broadband PCS frequency blocks C and F as "entrepreneurs' blocks," with bidding open to all bidders with attributable, cumulative gross revenues less than \$125 million and total assets less than \$500 million.<sup>6/</sup> At the same time, the Commission redefined "small business" to include any company with attributable, cumulative gross revenues less than \$40 million.<sup>7/</sup> The Commission also permitted outside investors to provide as much as 75% of the passive equity of an "entrepreneur" or "small business" without the assets or gross revenue of the investor being counted as part of the applicant.

The Fifth R&O permitted big businesses to acquire up to 25 percent passive ownership interests in entrepreneur's block applicants in non-attributable interests, i.e., without destroy-

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<sup>5/</sup> 9 FCC Rcd \_\_\_\_ (FCC 94-178, released July 15, 1994) ("Fifth R&O").

<sup>6/</sup> Fifth R&O, ¶¶113, 156. AIDE has timely filed a Petition for Reconsideration of the Fifth R&O, specifically challenging the "entrepreneurs' block" provisions.

<sup>7/</sup> Fifth R&O, ¶¶113, 175. The net worth of each attributable investor in an "entrepreneur" must be less than \$40 million. Id.

ing the applicant's entrepreneur-block eligibility.<sup>8/</sup> Passive ownership in entrepreneur's block applicants was defined to include non-voting stock and not more than 5% of voting stock for privately-traded corporate applicants and not more than 15% for publicly-traded corporate applicants.<sup>9/</sup>

The Order further expands on this exception, permitting big businesses to acquire 15% of the voting stock of all entrepreneurs' block applicants, whether privately or publicly traded.<sup>10/</sup> The likelihood of abuse of the passive investor rule becomes greater with a privately traded applicant, and so this expanded exception is imprudent.

By definition a privately traded applicant has more limited alternative sources of capital than does a publicly traded applicant. Thus, the privately traded applicant is likely to be far more susceptible to the so called "golden rule" of communications: "He who has the gold makes the rules."

Without doubt, the Commission's statutory authority under Section 309(j) is limited to its giving preferences to the four (4) defined types of Designated Entities.<sup>11/</sup> The Commission clearly exceeded that authority when it created a non-statutory

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<sup>8/</sup> Fifth R&O, Appendix B, Section 24.709(b)(4).

<sup>9/</sup> Id., ¶¶158, 163 & Appendix B, Section 24.720(j).

<sup>10/</sup> Order, ¶¶9-10.

<sup>11/</sup> See Sections 309(j)(3)(B) and 309(j)(4)(D) of the Communications Act; Conference Report to the Budget Act, H.R. Rep. 103-213, 103rd Cong. 1st Sess, 103 Cong. Rec. H5792, H5914 (August 4, 1993) (provision of House bill adopted in final Budget Act).

preference for sort-of-big-business "entrepreneurs" in the Fifth R&O, and then expanded that preference with the Order here in circumstances which will call into question the bona fides of all entrepreneurs' block applicants with outside investors.

#### CONCLUSION

Accordingly, the Association of Independent Designated Entities respectfully requests that the Commission reconsider its Order on Reconsideration as set forth herein.

Respectfully Submitted,

#### ASSOCIATION OF INDEPENDENT DESIGNATED ENTITIES

By: William J. Franklin  
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Its Attorney

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